

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

MICHAEL JOHNSON,
Petitioner,

No. 5:06-cv-101

-v-

HONORABLE PAUL L. MALONEY

WILLIE SMITH,
Respondent.

ORDER DENYING CERTIFICATE OF APPEALABILITY

Petitioner Michael Johnson filed petition for writ of habeas corpus under to 28 U.S.C. § 2254. The petition was automatically referred to the Honorable Ellen S. Carmody, United States Magistrate Judge, who issued a report and recommendation. Petitioner filed objections. On May 11, 2009, this Court dismissed the petition though an Order (Dkt. No. 38 - Order) adopting the report and recommendation over objections. Petitioner filed a notice of appeal and a motion for leave to proceed *in forma pauperis*. Upon filing of a notice of appeal, the district court who rendered the judgment must either issue a certificate of appealability or state why a certificate should not issue. *Castro v. United States*, 310 F.3d 900, 903 (6th Cir. 2002) (per curiam) (holding a district judge may either determine the certificate of appealability issue with the denial of the writ or upon the filing of a notice of appeal).

Under 28 U.S.C. § 2253(c)(2), a court may issue a certificate of appealability “only if the applicant has made a substantial showing of the denial of a constitutional right.” *See Miller-El v. Cockrell*, 537 U.S. 322, 337 (2003). To satisfy this standard, the petitioner must show that “reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were ‘adequate to deserve encouragement to proceed further.’” *Id.* (quoting *Slack v. McDaniel*, 529 U.S. 473, 483 (2000)). Courts should

undertake an individualized determination of each claim presented by the petitioner when considering whether to issue a certificate of appealability. *Murphy v. Ohio*, 263 F.3d 466, 467 (6th Cir. 2001) (per curiam) (*Murphy I*). See *Murphy v. Ohio*, 551 F.3d 485, 492 (6th Cir. 2009) (*Murphy II*) (after remand and on appeal, holding that *Slack v. McDaniel* requires a district court to provide a detailed certificate of appealability analysis as to each claim the petitioner raises in his or her petition).

As explained in the Order adopting the report and recommendation, Petitioner Johnson raised three issues in his petition. (Order at 2.) Having reviewed the report and recommendation, the objections, and the order adopting the report and recommendation over objections, this Court finds reasonable jurists would not disagree with this Court's resolution of Petitioner's constitutional claims. Counsel was not ineffective for failing to attempt to exclude evidence of the witness' identification of Petitioner. As explained in the Order, the law does not require a corporeal line up in this situation and the factual record does not support Petitioner's allegation that the photographic line up used was in any way suggestive. Petitioner failed to object to the Magistrate's recommendation regarding his due process claim. Finally, Petitioner has not provided a sufficient basis for concluding the evidence against him was insufficient. Petitioner merely recounts the evidence produced at trial, but does not undermine the credibility determination the trial judge necessarily had to make.

Accordingly, a certificate of appealability is **DENIED** as to each issue. **IT IS SO ORDERED.**

Date: June 30, 2009

/s/ Paul L. Maloney
Paul L. Maloney
Chief United States District Judge